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ABSTRACT

The literature and research about the courtroom use of videotape recordings and similar technology (such as the picturephone and closed circuit television) reveal conflicting opinions about the efficacy of using such technology in the courts. The major criticism seems to be about recording the testimony of witnesses, editing objectionable testimony, and showing the resulting videotape to the jury; this procedure arouses concern for the constitutional issues of right to confrontation, right to counsel and effective assistance of counsel, privilege against self-incrimination, and due process. Opponents argue that spatial and temporal discontinuities will result from editing procedures; and they wonder who should decide the ordering of testimony on the tape and how lawyers can effectively cross-examine a witness (during a videotape recording) without knowing how a judge will rule on challenges by opposing counsel. The advantages of videotape in trials are the speeding up of the judicial process (reducing courtroom time by a half to a third) and the deletion of inadmissable evidence before such evidence reaches the jury. The court decisions and research so far conclude that the "reel" and the "real" are roughly equivalent, with no impairment of legal rights resulting from videotape use. This positive response and the current use of videotape as a law school teaching aid indicate that major social changes in our view of courtroom justice are forthcoming. (RL)

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An Overview of Research on the Use of Videotape in the Courtroom and in Legal Education

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Introduction

In the past five or six years there has been great interest in the use of videotape technology amongst legal and communication scholars and practioners. Many reviews of the literature have appeared, (eg. Short et al, 1975, Miller and Fontes, 1978) and various pro and con arguments have been developed. (eg. McCrystal, 1971, 1972). Videotape has been used to record pretrial information, record full trial testimony, and as a teaching tool to improve trial advocacy skills.

This paper seeks to briefly summarize: 1) the reactions of legal practioners to the use of videotape in pretrial and trial situations, 2) the findings of communication researchers who have empirically tested the use of videotape technology in the courtroom. 3) the legal issues involved in the use of videotape in legal settings, 4) the use of videotapes in teaching advocacy skills in legal eduction, 5) suggestions for the expended use of videotape in legal eductions.

Uses of Videotape in Legal Contexts

There are three major areas where videotape has been utilized in the justice system: lineups, depositions and full trials. However, major emphasis in the legal literature has been on the latter two uses. Recording of pretrial testimony (depositions) has become fairly widespread in the legal community.

According to one attorney, the major advantages of videotaping the pretrial testimony for use at the trial are:

> It makes it possible for witnesses and attorneys to prepare better, and better preparation means a more efficient and effective presentation.
>
> It reduces the likelihood of last minute trial postponements or delays because witnesses are tardy or unavailable.
>
> It makes it possible to prepare the client better when testimony of key witnesses is known in advance.
>
> By removing uncertainty about significant segments of a case, prerecording permits the parties to better evaluate their cases for settlement purposes.
>
> Prerecorded testimony can be presented in its proper order making it more comprehensible to the jury.
>
> Inadmissible material, by-play between counsel or other potentially prejudicial, irrelevant or unnecessarily time-consuming matters can easily be excluded from the tape for a crisper paced presentation, reduced risk of mistrial, and an easier to follow presentation for the jury.
>
> Because the monitor can be placed immediately in front of the jury box and the sound amplified so each juror can hear what is presented, jurors are often able to see and hear testimony on videotape better than a live trial.
>
> Jurors exposed to videotape testimony have consistently pointed out that edited videotaped testimony holds their concentration better than a live presentation. (Murray, 1978, p. 261)

This type of deposition was first sanctioned by the federal courts in 1970, and now most parts of the nation use this procedure. Murray, (1978) discusses the present use of this process in general and specifically the experience in Ohio:

> Under the federal rules, when a person wants to record a deposition by videotape but his opponent will not stipulate to its use, he must obtain a court order assuring the accuracy, reliability and trustworthiness of the electronic record. Under the Ohio rules, the person need only advise his opponent that the deposition will be recorded by videotape.
>
> This approach has clearly promoted the development of videotaping techniques in Ohio. In effect it delegates to the trial lawyers the choice of the recording system, and requires only that the resulting record be accurate and fair. Thus, it has encouraged trial attorneys to experiment with recording systems and techniques in their efforts to make videotaped depositions interesting, effective and, on occasion, even entertaining. (Murray, 1978, p. 259).

The major criticisms of using videotape in the trial advocacy system seem to be centered more around the videotaping of whole trials than in using this technology for depositions of some witnesses. Many challenges on the use of videotape for full trials have been raised. The procedure involves videotaping testimony of witnesses, editing the objectionable testimony, and showing the resulting tape to the jury. One critic posits three challenges to this use of videotaping called "prerecorded videotape trial presentation" (PRVTT):

> First, should videotape be used in a criminal case; second is it even workable in civil cases; and third, is videotape so technically advanced that it can ensure that a recorded trial matches a live trial? (Hartman, 1978, p. 252).

The question of the effect of PRVTT on the guilt or innocence in a criminal case has been suggested in terms of the

jurors relating experience with T.V. shows on cops and robbers to the trial context over T.V. In civil cases saving both in trial time and travel time for witnesses living far away has been documented. One critic of the behavioral research in the area states that time savings has occurred:

> For example, in the 14 prerecorded land-condemnation cases heard in 10 Judge McCrystal's court in 1974, the State of Ohio needed to transport its appraisers from Columbus, the state capitol, to Sandusky, the trial site, only once, at which time their testimony on all 14 cases was taken. Had the trials been conducted live, they would certainly have stretched out over a period of time that would have required the appraisers to make many trips. (Bermant, 1975, p. 469).

However, this critic warns that this saving will result in "spatial and temporal discontinuities", because of the need to edit together these pieces of testimony, (Bermant, 1975, p. 469). A theoretical problem exists according to Eisenstein's theory that:

> two film pieces of any kind, placed together, inevitably combine into a new concept, a new quality, arising out of that juxtaposition. (Bermant, 1975 p. 469).

Another critic poses a similar challenge by questioning who would decide the ordering of testimony and, also, questioning whether a lawyer can affectively cross-examine a witness without knowing what ruling the judge will make on challenges by opposing counsel, (Hartman, 1978 p. 252). The widespread use of videotape in the courtroom may bring about major socially significant change in our view of courtroom justice. (Bermant, 1975 p. 472).

Official challenges to the use of videotape as evidence has already occurred. The Maryland State Court of Special Appeals, upheld videotaped evidence in a criminal trial, People v. Tobias, Case No. 84 of the 1977 term.) Tobias claimed that by showing a tape of him selling stolen goods to undercover police prejudiced his case because of the notoriety of this "Sting" operation. (Editor's note, Judicature, 1978, p. 292). The judges affirmed the conviction on the grounds that videotaped evidence like motion picture films are subject to the same rules requiring only relevance of the evidence Editor's note, 1978, p. 292).

The statement which may be representative of the reaction of many members of the legal community was expressed by Kosky, past president of the National Shorthand Reporters Associations, a group greatly threatened by the enroads of this new technology.

Kosky states:

> The law is traditionally slow to cast away concepts that have been proven by time and change is usually brought about in cautious ways. With the PRVTT, the legal profession finds itself faced with a total elimination of the traditional Anglo-Saxon trial and its replacement by essentially a series of edited tapes of depositions played to a jury. This is fundamental change of the first order which brings with it many ramifications. The legal community should think twice before rending and destroying the fabric of the open trial in open court and accepting the deep and wide changes in trial strategy and trial tactics implicit in the use of the prerecorded videotape trial. (Kosky, 1975, p. 238).

The reaction to any innovation among some members of the legal community is further demonstrated by the fact that many courtrooms, ". . . do not have sound systems, and air conditioning", (Weis, 1977, p. 1714).

This desire to maintain the status quo is not true of all participants within the legal system. Trial lawyers are eager to use devices that will help win cases, and the use of videotape technology appears to speed up getting a case on the docket which may lead to earlier settlements as many cases are settled when the trial date is set. (McCrystal, 1978 p. 254). This coupled with the time saving of one-half to one-third according to McCrystal, (1978, p. 254) and the deletion of inadmissible evidence presents a strong case by lawyers and judges for the use of PRVTT.

In addition to the use of videotape another technological device that has been used in the courtroom is the picturephone or closed circuit T.V. Judge Weis, U.S. circuit judge discusses the use of picturephone and closed circuit T.V. in trials and appellate proceedings. He describes an appeal by a defendant in a criminal case where a chemist testified for the prosecution over closed circuit T.V. from his lab. The appeal was rejected by the court. (Missouri v. McCoy, 1975, 336):

> While Dr. Young was not physically present in the courtroom, his image and his voice were there; they were there for the purpose of examination and cross-examination of the witness as much so as if he were there in person; they were there for defendant to see and hear and, by the same means, simultaneously for him to be seen and heard by the witness; they were there for the trier of fact to see and hear and observe the demeanor of the witness as he sat miles, but much less than a second away responding to questions propounded by counsel. (Weis, 1977, p. 1714 citing court decision).

Judge Weis states that some lawyers and judges may be threatened by these devices, or see them as gadgets, but he sees them ". . . as opportunities for imaginative and constructive use in furthering

our goal of administering justice properly and promptly." (Weis, 1977, p. 1716).

Another legal writer states that the use of the picture phone necessitates verifying that no tampering has taken place with the responses, (Haeberle, 1977, p. 65). There is the suggestion that the telephone or picturephone may even be superior to the actual presence of the witness because:

> . . . as for the "necessity" of the witness physical presence to brighten the accuracy if the fact finding process, it may be, . . . that the likelihood of deception leading to an erroneous conclusion is increased by the presence of the witness. (Haeberle, 1977, p. 70).

The generally positive reaction expressed within the legal journals about the increased use of video technology is further supported by the empirical findings of legal communication research.

Legal Communication Research and the Use of Videotape in the Courtroom

In the last four years there has been considerable research done in this area. The major study of videotape technology has been conducted under National Science Foundation Grants at Michigan State University. The project investigated:

> 1) Live verses videotaped trials, 2) Live verses color and monchromatic videotaped trials, 3) Deletion of inadmissible material in videotape trials, 4) Editing techniques for deleting inadmissible material, 5) Detecting witness deception in videotaped presentations and 6) Videotape production techniques (Miller and Fontes, 1978, Table of Contents).

The results of these studies may be found elsewhere (eg. Miller and Fontes, 1978), but the major conclusion is of relevance here.

> Considered as a whole, the findings fail to indicate that the use of videotaped trial materials produces any deleterious effects on juror response: in terms of the behaviors we have studied, "reel" is at least roughly equivalent to "real". (Miller and Fontes, 1978, p. 238)

There are various caveats throughout their report suggesting the limitation of the study, but the vast number of subjects, the realism of the methodology, and the replication of observations add great support to the findings of this project.

Brigham Young University researchers found some major difference between live and videotaped trials. Their conclusions reached after experimentation with non-deliberating mock jurors were, therefore, somewhat more guarded than the Michigan State team. They suggest that videotape should move slowly and cautiously into the legal arena, (Williams et al, 1975).

The study of videotape conducted at the University of the Pacific Law School, unlike the Michigan State and Brigham Young studies focused the jurors reaction to videotaping of preliminary hearings rather than the comparative studies cited above:

> A total of 100 witnesses, 44 attorneys, and 14 judges were either interviewed or observed. The concern of the study is with the possible disruption of proper courtroom demeanor and responsiveness produced by videotape recording (Bermant, 1975, p. 467).

Generalization of the findings on recording preliminary hearings may be extended to other in-court recording (Bermant, p. 467).

Many technical recommendations were, also made. The study found that using videotape in pretrial situations had ". . . little if any lasting behavorial impact on the principal participants". (Bermant, 1975, p. 474). While all of the above studies generally avoided deliberating juries for data collection, the attempted use of real jurors or aproximations of these jurors adds generalizability to the findings. One major criticism of this research is the same as much of the criticism of much group research, that little contextual replication has occurred. (Bermant, 1975, p. 485). Therefore, theory building is difficult (Shaw, 1976). Although, the Michigan State project has attempted to develop theory through replications, additional cross country replications should follow.

Legal Issues Involved in Using Videotape in Legal Settings

Five Constitutional issues may be considered relevant to the discussion of the use of videotape recording in legal situations. (See eg. Short et al, 1975, p. 454-457 for discussion of early cases.) One issue is the right to confrontation. Because the witness may not be present during the trial when a deposition has been videotaped previously, there is the question of the defendant's right to confront or cross examine the witness. People v. Moran, (1974) concerned a challenge by the defendant of a videotape of a dying witness. However, since the defendant's attorney had cross examined the witness at length during the videotaped deposition, the appeal's court ruled that there was opportunity

for confrontation.

More recently, an appellate court denied a defendant's plea that the defendant's counsel was not present during the videotaping of a lineup and, therefore, was denied the right of counsel. The court stated that the defendant was probably better protected by having the videotaped record of the lineup, than actually having the lawyer observe the process. (People v. Lewis, 1977). In an earlier case (United States v. Ash, 1973) the court had a similar reaction to the objection that counsel should be present at a photographic lineup.

The right to effective assistance of counsel has questioned the possibility of reopening examinations of a witness if the witness is no longer available, and only the videotape is available. In a tangentially related recent case on exclusion of hearsay evidence (not videotaped) becuase of a lack of opportunity for challenges by cross examination, the court found that the problems with hearsay testimony may be overcome by the requirement that the statements be necessary and trustworthy. (Frazier v. Continental Oil Co., 1978). This may relate to the challenge on the use of videotape. If the videotape testimony is necessary and trustworthy this may override the impossibility of reopening cross examination.

Videotape may actually enhance one's rights. One court descision found that videotape did not hurt one's privilege against self-incrimination, because the tape provided a record of how a confession was taken. Any coercion could be better seen, reasoned the court, on the tape playback than by simply reading the transcript. (Hendricks v. Swenson, 1972)

In the early 60's an appeal's court required written transcripts of tapes (audio) played to a jury (People v. Mulvey, 1961; People v. Harris, 1972). However, more recent opinions state that the tape need not be recorded into the written transcript because, the appellate court could listen to the tape if necessary. One recent court decision stated:

> In fact, sometimes the appellate court considers the tape recording to be a better record of what occurred at trial than the reporter's transcript of the tape played to the jury. (People v. Bowie, 1977, p. 152)

A tape recording may serve as a more specific record than the transcript as more clues are available for analysis.

The possibility that information may become distorted through the use of videotape brings up the issue of right to due process. In People v. Moran, (1974) the court held that the videotape medium's possible "filtering" effect would filter on both sides of the case and, therefore, not be unfair. Further, videotape was stated to be ". . . sufficiently similar to live testimony to permit the jury to properly perform its function, (People v. Moran, 1974, p. 410)." However, the validity of the videotaped representation must be proven. In one case a videotaped interview between a plaintiff and his attorney done without the knowledge of the defense counsel, showed the plaintiff to be in a partially catatonic state. It was found not to be admissible as evidence of the plaintiff's state, because the plaintiff' physician stated it was not a fair representation.

However, the court stated that the tape was neither inflammatory or prejudicial to the jury. (Foster v. Crawford Shipping Co., Ltd., 1974, p. 788-790). Thus, care must be taken to insure that the videotaped evidence is representative of what is claimed and done in a proper manner. Generally, the courts have been favorable to the use of videotaping and the process has not been viewed as an infringement of one's rights.

Use of Videotape in Legal Education

This discussion of the legal issues involved in the use of videotape in court, seems to support legal and communciation researchers' reaction to the generally positive value of continued use of videotape. The question that then comes to mind is, how prepared are lawyers to use this new technology in the best interest of their clients? What type of training are law schools including in trial practice courses in the use of videotape?

A recent survey of law schools indicated that 13 schools mentioned:

> Use of VTR as a means of aiding and evaluating speaking skills of their students. Evidence is that the instant replay devise of providing the student with a moving picture of himself talking, pleading, and arguing in a simulated situation is a highly valuable teaching mechanism. (Stone, 1977, p. 240).

The use of videotape in the trial advocacy classes has been developing. University of California, Los Angeles Law School reports the wide use by trial advocacy instructors of videotape for skills instruction. The UCLA Law School is in the process of expanding their videotape facilities by equiping four rooms with extensive equipment under a large research grant. Videotape is used widely at this law school especially: in mock trials, placement office for

practice interviews, and by some instructors to preserve lectures. (According to a telephone discussion with Ms. Michelle Thrush, Office of Clinical Legal Education, UCLA, January 30, 1979).

The University of Southern California Law School reports using videotape in teaching trial advocacy. Students are videotaped and playback with faculty critiques take place. However, due to lack of private student-teacher conference time this technique is not used as much as it could be (according to Ms. Lee Campbell, Associate Director, USC Law School Program). Seminars for young lawyers under the California Institute for Trial Advocacy Skills, also, uses videotape for instruction. (According to telephone discussion with Ms. Lee Campbell).

Loyola University of Chicago Law School has extended the use of videotape beyond the advocacy classroom and has been involved with the videotaping of faculty for instructional development purposes (see eg. Kessler-Puchowitz, Grant Proposal, 1976). Thus, there is developing a greater interest in the use of videotape in trial work. Although law schools are beginning to use the technology to some extent for skills improvement, the paper presents a case for the development of training in the new technology.

Suggestions for Future Uses of Videotape in Legal Education

If the above summary of legal and communication literature suggest the continued and expanded use of videotape in pretrial and trial situations, trial lawyers will be using this advice more frequently. Technical competence is available, however, training in speaking techniques (volume, pitch, rate, etc.) and nonverbal

communication (eye contact, physical appearance, gestures) should be discussed in trial advocacy classes in relationship to the use of videotape in law practice. When new technological developments are introduced into any field there is understandable resistance. Diffusion of innovation research suggests that opinion leaders from within the community experiencing the innovation may be very helpful in the change process, (Rogers and Shoemaker, 1970). Perhaps, lawyers need to become more involved in sharing with each other, devices for successful videotape use. Previously, lawyers have given seminars and written articles in various trial practice techniques. (See eg. Morrill, 1972). The extended use of videotape provides a new avenue for such sharing.

The introduction of Vydec, one type of word processing equipment, and computerized libraries are gaining wide acceptance within the legal community, and seminars are offered on the use of these devices. The expanded use of videotape in the courtroom may lead to a similar expanded emphasis in the law school classroom and continuing legal education seminars on the possible value and communication considerations involved in speaking over videotape in court.

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I N T E R V I E W S

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ABSTRACT

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In the past five or six years there has been great interest in the use of videotape technology amongst legal and communication scholars and practioners. Many reviews of the literature have appeared, and various pro and con arguments have been developed. Videotape has been used to record pretrial information, record full trial testimony, and as a teaching tool to improve trial advocacy skills.

This paper seeks to briefly summarize: 1) the reactions of legal practioners to the use of videotape in pretrial and trial situations, 2) the findings of communication researchers who have empirically tested the use of videotape technology in the courtroom. 3) the legal isues involved in the use of videotape in legal settings, 4) the use of videotapes in teaching advocacy skills in legal education, 5) suggestions for the expended use of videotape in legal education.